Supreme Court, U.S.
FILED
NOV 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-661

GEORGE BANTA COMPANY, INC.,
BANTA DIVISION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
and
GRAPHIC ARTS INTERNATIONAL UNION,
LOCAL NO. 382, AFL-CIO, CLC,

Respondents,

BRIEF OF RESPONDENT GRAPHIC ARTS INTERNATIONAL UNION, LOCAL NO. 382, AFL-CIO, CLC, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EUGENE COTTON,
RICHARD F. WATT,
THOMAS D. ALLISON,
Attorneys for Respondent
Graphic Arts International Union,
Local No. 382, AFL-CIO, CLC

Of Counsel:

COTTON, WATT, JONES, KING & BOWLUS
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

CHAS. P. YOUNG-CHICAGO

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BRIEF OF RESPONDENT GRAPHIC ARTS INTERNATIONAL UNION, LOCAL NO. 382, AFL-CIO, CLC, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Graphic Arts International Union, Local No. 382, AFL-CIO, CLC, urges the Court to deny the petition for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit. Contrary to Petitioner's claims, the decision below follows the prior decisions of this Court, creates no conflict among the circuits, and raises no question of law to be resolved by this Court.

Statement of the Case

Petitioner's statement of the case misstates the record. Contrary to Petitioner's repeated assertions, this case does not involve judicial review of approval of a settlement by the General Counsel to the National Labor Relations Board. As the record shows, no such settlement was ever approved; the proposed settlement was in fact rejected by the General Counsel at the specific urging of Petitioner. Rather, Petitioner seeks judicial review of the General Counsel's unreviewable decision not to issue a complaint on Petitioner's unfair labor practice charges. Because of Petitioner's misleading characterization of the record facts, Respondent believes a full statement of the case is appropriate.

Petitioner George Banta Company, Inc. (hereinafter referred to as the "Company"), is a printer with production facilities located in Menasha, Wisconsin. The Company's bindery and lithographic employees have for many years been represented by Locals 32-B and 88-L of the Graphic Arts International Union, AFL-CIO. These employees engaged in a lawful strike from April 4 to October 8, 1977. During the strike, the two local unions began to discuss merger, and in March, 1978 the local unions merged to form Local 382, Graphic Arts International Union, AFL-CIO (hereinafter "Local 382" or "the Union"). In anticipation of this merger, new Union by-laws were drafted and a unified schedule of Union dues and initiation fees adopted. Because of the financial impact of the strike, Union dues and initiation fees were increased, with the new initiation fee fixed at an amount equal to the new member's rate of pay for fifty straight-time hours of work.[1]

On January 19, 1978 the Company filed unfair labor practice charges alleging that the new initiation fee was excessive and discriminatorily motivated, and restrained employees in

[1]Contrary to the implications of the Company's Petition, the new initiation fee has been consistently required of *all* new members of Local 382, regardless of their employer, their past participation in protected activity, or their prior status.

the exercise of their Section 7 rights, in violation of Sections 8(b)(1)(A), 8(b)(2), and 8(b)(5) of the National Labor Relations Act (hereinafter "the Act"), 29 U.S.C. §§158(b)(1)(A), 158(b)(2), 158(b)(5). On May 22, 1978 the General Counsel issued a complaint on part of the Company's charges, alleging that the new initiation fee violated Sections 8(b)(5) and 8(b)(1)(A) of the Act.

Prior to hearing, the Union and the General Counsel entered into an informal settlement of the charges. Under this proposed settlement, the Union would limit the initiation fee to $250, and return with interest all initiation fees paid in excess of $250. The settlement was approved at the Regional level on November 29, 1978, over the Company's objections. The Company appealed this Regional approval to the Board's Office of the General Counsel in Washington, D.C.

The General Counsel ruled on this appeal by letter to counsel dated March 27, 1979, stating that he was rejecting the proposed settlement because he believed that, even with the $250 "cap", the initiation fee was still excessive. The allegation of excessiveness was remanded to the Regional Director for further proceedings, including, if necessary, reissuance of an appropriate complaint. With respect to the balance of the Company's charges, the General Counsel found that, without regard to the rejected settlement, the evidence was insufficient to establish that the Union has violated the Act.

The Company has appealed from this letter of March 27, 1979, and specifically the General Counsel's refusal to reissue a complaint on those portions of the Company's charges which the General Counsel found were not supported by sufficient evidence.

THE DECISION BELOW FOLLOWS THE DECISIONS OF THIS COURT AND CREATES NO CONFLICT AMONG THE CIRCUITS

I. The Company Has Misstated The Case In An Apparent Attempt To Present An Issue Which Is Not Involved

The United States Court of Appeals below accurately described this case as follows (App. 4a-6a):

> The action sought to be reviewed here is the decision of the General Counsel to withdraw and not to prosecute further the charge in the complaint originally issued against the Union that the initiation fee was discriminatory.
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> * * * *
>
> [T]he decision not to proceed with the discrimination charge was based essentially upon the independent conclusion that the available evidence was insufficient to prove the charge.

The General Counsel, for reasons thoroughly explained in writing to the Company, determined that the evidence presented to him showed that no violation of Sections 8(b)(1)(A), 8(b)(2) or the prohibition against discrimination in 8(b)(5) had been committed by the Union. Accordingly, these unfair labor practice charges were not pursued by the General Counsel in his reissued complaint; not because they had been settled, for the settlement had in fact been rejected, but because they were unsupportable by the facts. Petitioner's continuing assertion that this case involves review of approval of a settlement—when in fact the only proposed settlement was *rejected* by the General Counsel—misstates the record evidence, distorts the clear holding of the Court of Appeals, and confuses the applicable precedent.

As the Court of Appeals found and the record clearly shows, this case presents only the question of whether the General Counsel's determination not to issue a complaint based on a lack of evidence is reviewable.

II. The Petition Should Be Denied: The Decision Of The Court Of Appeals Is Clearly Correct

With the legal issue thus formulated, the Petition must be denied. This Court has made it clear that, consistent with the mandate of Section 3(d) of the Act,[2] the General Counsel's decision not to issue a complaint on unfair labor practice charges is unreviewable.

In *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967), this Court stated (emphasis added):

> [T]he Board's General Counsel has *unreviewable discretion* to refuse to institute an unfair labor practice complaint.

This Court more recently confirmed this fundamental holding in *N.L.R.B.* v. *Sears, Roebuck & Co.,* 421 U.S. 132, 138-139 (1975)(emphasis added):

> . . . Congress has delegated to the Office of General Counsel "on behalf of the Board" the *unreviewable authority* to determine whether a complaint shall be filed . . . . The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

In both cases this Court's holdings concerning the General Counsel's unreviewable authority to issue complaints were central to the Court's ultimate holdings. In *Vaca* v. *Sipes,*

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[2] Section 3(d) of the Act, 29 U.S.C. §153(d), states (emphasis added):

> The General Counsel of the Board . . . shall have *final authority,* on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

supra, the unreviewable nature of the General Counsel's prosecutorial authority was a primary basis for this Court's holding that the Board did not have exclusive jurisdiction over suits for breach of a union's duty of fair representation. In *Sears, Roebuck & Co., supra,* lack of reviewability was central to the Court's rulings under the Freedom of Information Act, 5 U.S.C. §552.

Nor is there any conflict among the circuits. Every Court of Appeals has consistently held that it has no jurisdiction to review the General Counsel's determination not to issue complaint on unfair labor practice charges. *N.L.R.B.* v. *Oil, Chemical & Atomic Workers International Union,* 476 F.2d 1031, 1036 (1st Cir. 1973); *United Electrical Contractors Association* v. *Ordman,* 366 F.2d 776 (2nd Cir. 1966), *cert. denied,* 385 U.S. 1026 (1967); *Terminal Freight Cooperative Assn.* v. *N.L.R.B.,* 447 F.2d 1099, 1102 (3rd Cir. 1971), *cert. denied,* 409 U.S. 1063 (1972); *Wellington Mill Division, West Point Mfg. Co.* v. *N.L.R.B.,* 330 F.2d 579, 590 (4th Cir. 1964), *cert. denied,* 379 U.S. 882 (1964): *Bova* v. *Pipefitters & Plumbers Local 60,* 554 F.2d 226 (5th Cir. 1977); *Mayer* v. *Ordman,* 391 F.2d 889 (6th Cir. 1968); *Balanzi* v. *Local 1031, I.B.E.W.,* 374 F.2d 723, 726 (7th Cir. 1967); *Augspurger* v. *Brotherhood of Locomotive Engineers,* 510 F.2d 853, 858, n. 7 (8th Cir. 1975); *Henderson* v. *International Longshoremen's and Warehousemen's Local 50,* 457 F.2d 572, 578 (9th Cir. 1972), *cert. denied,* 409 U.S. 852 (1972); *Poss* v. *N.L.R.B.,* 565 F.2d 654, 657 (10th Cir. 1977); *I.L.G.W.U.* v. *N.L.R.B.,* 501 F.2d 823, 831 (D.C. Cir. 1974). This principle is not altered by the fact that, as here, the General Counsel has elected to prosecute *other* elements of the company's charges. *See, e.g., N.L.R.B.* v. *I.B.E.W., Local 357,* 445 F.2d 1015, 1016 (9th Cir. 1971), and *Wellington Mill Division, West Point Mfg. Co.,* v. *N.L.R.B., supra.* Nor does it matter that the prosecutorial determination not to proceed because of lack of merit resulted in a determination not to reissue a complaint previously withdrawn. *See, e.g., Local 282, I.B.T.* v. *N.L.R.B.,* 339 F.2d 795, 799 (2nd Cir. 1964).

The Company's requested remedy, an evidentiary hearing on the General Counsel's dismissal of its charges, would necessarily force *every* unfair labor practice charge to hearing upon demand of the charging party. A charge could never be dismissed for lack of merit; it could never be settled if the charging party persisted in its demand for a hearing. The General Counsel's prosecutorial discretion, clearly expressed in Section 3(d) of the Act, 29 U.S.C. §153(d), would be totally abolished.

By not proceeding on charges not supported by the evidence, the General Counsel has made no adjudicatory decision from which the Company may seek review. The General Counsel's finding that the evidence did not support certain of the Company's claims, and his decision not to issue a complaint on those charges was a prosecutorial determination, unreviewable under the Act. The clear language of the Act, and the consistent decisions of this Court and each Court of Appeals, fully support the dismissal below of the Company's petition for review.

CONCLUSION

For the foregoing reasons, Respondent Graphic Arts International Union, Local No. 382, AFL-CIO, CLC, prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

EUGENE COTTON,
RICHARD F. WATT,
THOMAS D. ALLISON,
Attorneys for Respondent
Graphic Arts International Union,
Local No. 382, AFL-CIO, CLC

Of Counsel:

COTTON, WATT, JONES, KING & BOWLUS
Suite 4750, One IBM Plaza
Chicago, Illinois 60611
(312) 467-0590

November 21, 1980